

Address by Judge Robert M. Duncan

Ohio State University Commencement

December 7, 1979

I congratulate each of you who today will become a graduate of this outstanding University. I am proud to have received my own graduate and undergraduate degrees from Ohio State. Whether you are today marking the grant of your first college degree or the receipt of graduate or professional letters, this graduation ceremony celebrates a turning point in your life. It is a rite of passage which entitles you to a new and important standing in our society. We welcome you and delight in sharing your joy of success. Today is both a day of celebration and a fitting occasion for each of you to examine the course of your lives. Unfortunately, it is also a traditional time for graduation speakers to test one final time the patience instilled by untold numbers of lectures of 50 minutes duration. I shall endeavor not to overstay your very kind welcome.

First, let me take the liberty to speak on behalf of all of today's graduates, and to thank all of you who have given inspiration, time, guidance, money, patience, instruction, and love. Nobody goes anywhere in today's world without a lot of help.

I suppose that all of us can identify a certain day or days that stand vividly in our memory. December 7, 1941, is a day I remember clearly. For those of us who lived through it, the question, "Where were you on Pearl Harbor Day?" continues to evoke vivid memories. The horrible opening of a horrible war in the Pacific. That afternoon my late father and I had been to the racially segregated movie in our hometown, Urbana, Ohio, and we heard about Pearl Harbor on the way home. Somehow I recall my thoughts: This war can't last long; we can quickly defeat a small country in the Far East. Our country is the best in the world--the country of Washington, Jefferson, Lincoln and Roosevelt, the land of the free and the home of the brave. I was for the moment concerned about the

war. My more long-term concern was whether Urbana could beat Bellefontaine in basketball that year. We lost.

Now, 38 years later, in middle age with all of its elusive joys, I have the honor of speaking at this convocation. In the intervening years, the hometown theater became integrated, World War II was won, and Urbana has fared exceptionally well in basketball. Yet, the combined wisdom of all of history's prophets could not have foretold that I would be standing at this podium this day on the threshold of the 80's to celebrate your successful academic efforts. I am proud and honored to be here.

Having been fortunate to have had an excellent education at this University, an opportunity for professional legal and judicial experience, wonderful family and friends, and an enormous amount of luck, I hold the office of United States District Judge: a position of awesome power and staggering responsibility.

I would like to speak briefly about the FEDERAL

JUDICIARY AND SOCIAL CHANGE, and then make comments about the approaching 1980's. Please hold in mind that I do not speak for the Federal Judiciary or any other judge.

While preparing these remarks, I was reminded of a story told about the late Robert Benchley, well-known drama critic, editor of the Harvard Lampoon, and a member of the famed Algonquin Roundtable. While a student at Harvard, Benchley came across a final examination question that read:

"Discuss the arbitration of the international fisheries problem given above in respect to hatcheries protocol and trawling procedures as it affects:

- (a) The point of view of the United States;
- (b) The point of view of Great Britain.

Benchley answered with a mixture of directness and evasion, saying:

"I know nothing about the point of view of Great Britain in the arbitration



of international fisheries disputes, and nothing about the point of view of the United States; therefore, I shall discuss the question from the point of view of the fish."

From that perspective, you are forewarned that we will be swimming upstream for a while this morning.

Today, the Federal Judiciary--the Third Branch of government, or in Alexander Hamilton's words, the "least dangerous" branch--is the subject of devastating criticism, and, less often, aggrandizing praise. It is hazardous to attempt an appraisal of citizen perception of the judicial system. Today's supporters are often tomorrow's critics. Current majority attitudes are frequently tomorrow's dissents. Oddly enough, many of today's hawks were yesterday's doves.

Criticism of judicial decision-making regarding social issues has taken many forms.

As a threshold matter, the judiciary has been

accused of judicially legislating: encroaching upon the legislative function by liberally interpreting the Constitution so that it would not today be recognized by its framers. But in an age which itself would not be recognized by the framers, their creation has had to adapt apace.

It is the function of the judiciary to facilitate this adaptation. As deTocqueville commented early on,

Without federal judges the Constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislature; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests,

and as Judge Renfrew has observed, especially today, the interests of private citizens against the government.

With increasing frequency, we hear another form of criticism: Critics decry the fact that the courts have not only declared certain governmental acts unconstitutional, but have proceeded to order remedies that call for massive social restructuring. For example, courts have ordered the attainment of racial balance in education; one man, one vote concepts of political representation in legislative bodies; and the restructuring of management of state prisons and hospitals.

These court remedies are viewed as judicial usurpations of the power of other branches and are admittedly unpopular. Yet citizens continue to bring these questions to the judiciary for resolution. It tends to make one believe Lord Deming's aphorism that the judge must find a solution for every problem, whereas the law professor must find a problem for every solution.

The source of the courts' power to decide these

questions and order these remedies lies in the obligation to apply the United States Constitution when called upon to do so. The source of the courts' difficulties in resolving these questions stems from the problems inherent in implementing that venerable document in these complex times.

One such area of difficulty is the judicial supervision of the desegregation of school districts. I believe as a matter of preference it would have been more appropriate for another branch of government to have tackled the problem of school desegregation. Both the legislative and the executive branches have more efficient machinery to investigate problems and provide solutions and remedies. Despite this capability, from the days of Reconstruction until May 17, 1954, nothing <sup>was done</sup> was done. Left alone, the problem simply would not go away. In a proper case--the famous case of Brown v. Board of Education, decided that day--the matter was brought before the courts, and the constitutional deprivations were lucidly demonstrated.



The judicial remedy of mass reassignments of children is, for some, a bitter pill to swallow. Given the best of all worlds, most of us would rather have our children attend our neighborhood school. Nonetheless, our law dictates that however important that preference may be, an effective remedy for a constitutional deprivation is even more important. As one who has lived with a school desegregation problem for a long time, I am convinced that no one has been able to suggest a way to provide a solution that promises a timely remedy for a socially segregated school system and which still allows students to attend the school nearest their homes.

So long as the judiciary continues to be summoned to decide this kind of question, it must be sensitive to the nature of these issues and exercise its authority with moderation. We of the Third Branch must always remember that judicial authority should be used sparingly. It has been said, and I firmly believe, that the most responsible

use of power is its restraint. Judges should prefer the scalpel to the extremes of the meat axe or the bandaid.

In addition, we of the judiciary must understand that highly intelligent, decent, righteous, and honorable persons may vigorously disagree with our judgments, and we must protect their right to do so, as long as it does not interfere with the courts' orders.

Maybe, just maybe, in the 1980's we of the Third Branch can return to the litigation of matters more traditional--suits for personal injury and property damage, contract and commercial disputes--all subjects that lawyers have studied long and hard. I would welcome such a docket, but I can't foresee it occurring in the near future.

Modern-day courts have become the forum for solving problems heretofore solved through more informal and personal negotiation. Certainly, I could not have predicted when I was in law school in the early 50's that in 1979, a 28-year-old man would sue his parents for malpractice in parenthood,

claiming that he would not be a drug addict if he had been properly reared.

Please remember citizens bring the lawsuits to court. The current litigation explosion probably will continue so long as we Americans are either unable or unwilling to find alternate solutions to provide protection for individual rights. Finding effective alternatives will require that other bodies--in government: the legislature and the executive; elsewhere: private corporations, community groups, civic organizations, and educational institutions such as this great university--will assume a greater share of responsibility for solving the problems that today are sent to the courts.

In particular, this will mean a de-emphasis on the search for those persons who are at fault for social injustice. Why not let the question of who caused social injustice be subsumed by a dedication to its elimination wherever it is found--regardless of who caused it or why it was done?

I have great trepidation about stating my predictions for the 80's. My track record in prophecy is terrible. I thought Dewey would defeat Truman, downtown Columbus was overbuilt, Baltimore would beat Pittsburgh, and the Buckeyes would have a great season, finishing 9 & 2. However, I'll give prophecy a try.

Troublesome economic problems will be compounded. It is apparent that the next decade will be a time of scarcity. The new challenge is whether or not we can have a better life with less. Even the best efforts of our brightest and most dedicated scientists and engineers cannot deliver inexhaustible supplies of all coveted resources.

What President Lincoln said regarding his momentous era is true today:

"The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise to the occasion; as



our core is new--so we must think anew  
and act anew."

Assuming future scarcity, the best in all of us  
is demanded. If the 70's have accurately been labeled the  
"me decade," and that label connotes a swell of insensitivity  
to the basic needs of others, then proliferation of that  
notion into the 80's may signal disaster. Our highly success-  
ful form of democratic capitalism requires individual  
motivation, aggressiveness, and the establishment of lofty  
personal goals. But striking a reasonable balance between  
personal success and community concern will be the challenge  
of the 80's.

A key element in that balance must be the elimination  
of racial injustice. We have tried years of segregation in  
America. It simply has not worked and never will work. It  
should be put to rest.

Arthur Schlesinger writes:

"Racial justice remains the great

unfinished business on our national agenda. This generation has made significant progress toward a genuinely multiracial society. But we still have much to do, and we cannot rest where we are. Moreover, as increasing energy costs and declining population threaten to slow the rate of economic growth, we will not have the economic surplus to lubricate social change. Our economy will tend increasingly toward a zero-sum game, where one person's gain is another person's loss; and the result can only be an alarming increase in tension between the classes."

~~I am not sure if this is the correct text.~~  
The recent record of America in acting to eliminate

racial injustice has been commendable. I did not anticipate

such progress when I graduated from this University. I offer thanks for and take pride in this University's commitment of human and financial resources to attract and support minority students in the graduate school. I believe this University leads the nation in its success in this undertaking--but the broader struggle for racial justice is far from over.

The problems which we face on the dawn of a new decade are too involved and multifaceted to lend themselves to any simple solution. Certainly one of the fundamental aims of higher education would be thwarted were there present among you today any graduate who does not comprehend something of the enormous complexity of the problems facing this country and humanity at large today. Each of you is now a recipient of a higher education obtained in one of the most literate and influential countries on earth. Each of you, I believe, is now charged with the duty of bringing the voice of reason and understanding to the conduct of your daily lives and to the exercise of such power and influence with which you

surely will be entrusted.

In your pursuit of a college degree, each of you has been exposed to a greater or lesser extent to that panoply of historical, economic, and social forces which comes to bear in virtually every human dispute. It is across the desks and drawing boards of you, the formally educated, that many of these disputes and problems will pass. If I can leave one thought with you, to take with you, as you leave the arena today, I urge each of you to resolve, if you have not already done so, that you will endeavor to devote part of your learning and talent to recognizing social injustice and exposing it; and to restrain the tendency to follow the majority will where it works to the detriment of individual rights. It is for us, the beneficiaries of higher education, to lead the way in a drive to eradicate social injustices.

We must not forget that the freedom of this land is a franchise which extends to every level of society and



to every human being in it.

My message to you is that just as every citizen is entitled to drink from the fountain of freedom, he or she has a correspondent obligation to ensure that the fountain remains intact for the sustenance of all people. We owe this to ourselves, and to our children. Not the least, we owe it to our alma mater, The Ohio State University, which has produced generations of educators and leaders, and which will continue to do so if you and I have enough good sense and good fortune to make the right decisions in the coming years.